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10 Attorneys for Plaintiffs
11 LENSRAFTERS, INC. and
12 EYEXAM OF CALIFORNIA, INC.

13 IN THE UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 OAKLAND DIVISION

16 LENSRAFTERS, INC. and EYEXAM OF
17 CALIFORNIA, INC.,

18 Plaintiffs,

19 v.

20 LIBERTY MUTUAL FIRE INSURANCE
21 COMPANY; EXECUTIVE RISK SPECIALTY
22 INSURANCE COMPANY; UNITED STATES
23 FIRE INSURANCE COMPANY; MARKEL
24 AMERICAN INSURANCE COMPANY and
25 WESTCHESTER FIRE INSURANCE COMPANY,

26 Defendants,

27 AND RELATED COUNTER- AND CROSS-
28 CLAIMS.

Case No.: C-07-2853 SBA

**LENSRAFTERS, INC.'S AND
EYEXAM OF CALIFORNIA, INC.'S
OBJECTIONS TO UNITED STATES
FIRE INSURANCE COMPANY'S
REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF ITS MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, STAY ACTION**

Hearing Date: September 18, 2007

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

1 Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together “LensCrafters”)
2 respectfully submit the following objections to the request for judicial notice submitted by United
3 States Fire Insurance Company (“U.S. Fire”) in support of its Motion To Dismiss or, in the
4 Alternative, Stay Action.

5 U.S. Fire seeks judicial notice pursuant to Federal Rule of Evidence 201 that it filed a
6 “parallel state court complaint on May 24, 2007 in the Supreme Court of the State of New York,
7 County of New York, *United Fire Insurance Company v. Luxottica U.S. Holdings Corp., et al*,
8 (New York Supreme Court Case No. 07/07338)” LensCrafters does not object to the Court
9 taking judicial notice that U.S. Fire filed the complaint that is attached to the request for judicial
10 notice (the “New York Action”), but specifically objects to the characterization of the complaint, or
11 the New York Action, as “parallel.” This description is U.S. Fire’s opinion, conclusory and a
12 matter of dispute in the motion to dismiss, and thus falls outside the permissible scope of Federal
13 Rule of Evidence 201. It is up to the Court, upon reviewing and comparing this action to the New
14 York Action, to determine whether they are “parallel.” To the extent that U.S. Fire’s request for
15 judicial notice is inconsistent with Federal Rule of Evidence 201, it should be denied.

16 Federal Rule of Evidence 201 allows a court to take judicial notice of facts that are “not
17 subject to reasonable dispute in that [they are] either (1) generally known within the territorial
18 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources
19 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Pursuant to Rule 201, the
20 court may take judicial notice of public records including court proceedings. *See U.S. ex rel.*
21 *Robinson Rancheria Citizens Council v. Borneo, Inc.*, 981 F.2d 244, 248 (9th Cir. 1992) (taking
22 judicial notice of proceedings in other courts). But the purposes for which a court may properly
23 take judicial notice of such records are narrow; judicial notice is generally taken only of “the
24 existence and authenticity” of public records. *Del Puerto Water Dist. v. U.S. Bureau of*
25 *Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D. Cal. 2003). A court may not take judicial notice of
26 one party’s *opinion* of how a matter of public record should be interpreted. *United States v. S. Cal.*
27 *Edison Co.*, 300 F.Supp.2d 964, 974 (E.D. Cal. 2004).

28 Here, it would be improper for the Court to take judicial notice of U.S. Fire’s

1 characterization that the New York Action proceeding is “parallel” to the pending action in this
2 Court. The description is U.S. Fire’s opinion rather than a fact that is not reasonably subject to
3 dispute. As explained in LensCrafters’ Opposition to U.S. Fire’s Motion To Dismiss, the New
4 York Action is similar to this action, but not identical. U.S. Fire has chosen to sue different parties,
5 including some that do not belong in the case and omitting one necessary insurer. Additionally, the
6 New York Action does not include breach of contract and bad faith claims, which LensCrafters has
7 sought leave to add in this action. In any event, the similarity of the New York Action and this
8 action is one of the issues that the Court must decide in order to resolve U.S. Fire’s Motion To
9 Dismiss. Again, LensCrafters does not oppose the request to judicially notice that the New York
10 complaint was filed, but to the extent U.S. Fire is seeking judicial notice of disputed facts or their
11 assertion about the characterization of the New York Action, its request for judicial notice should
12 be denied.

13 August 28, 2007

Respectfully submitted,

14 HELLER EHRMAN LLP

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16
17 By /s/ Richard DeNatale

RICHARD DENATALE

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19 LENS CRAFTERS, INC. and EYEXAM OF
20 CALIFORNIA, INC.
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